

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

FEB 20 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0292-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
STEVEN WILDMAN,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-57795

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Law Office of Stephanie J. Meade
By Stephanie J. Meade, Esq.

Tucson
Attorney for Petitioner

H O W A R D, Presiding Judge.

¶1 Steven Wildman petitions this court for review of the trial court’s denial of his petition for post-conviction relief. We grant review but, for the following reasons, deny relief.

¶2 We review the trial court’s decision granting or denying post-conviction relief for an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We defer to the trial court with respect to factual findings unless they are clearly erroneous. *Id.* Wildman was charged with first-degree murder and conspiracy to commit first-degree murder. His first trial ended in a mistrial after the jury was unable to reach a verdict. After his second jury trial, Wildman was convicted of both charges. His convictions and sentences were affirmed on appeal. *State v. Wildman*, No. 2 CA-CR 99-0037 (memorandum decision filed Oct. 30, 2001).

¶3 Pursuant to Rule 32, Ariz. R. Crim. P., Wildman filed a petition for post-conviction relief.¹ He raised numerous claims, many of which involved allegations of ineffective assistance of counsel. The trial court summarily denied relief on most of the claims and held an evidentiary hearing on the claim that trial counsel had been ineffective for failing to call certain witnesses. After the hearing, the court denied relief.

¶4 When a trial court’s order denying a petition for post-conviction relief “clearly identif[ies] the issues raised[,]” and “[e]ach issue raised is correctly ruled upon in a fashion

¹We note with concern that four years elapsed between the date Wildman filed his notice of post-conviction relief and the date he filed his petition. Over that time Wildman’s counsel sought and received numerous extensions. Although it was within the trial court’s discretion to grant the requested extensions, we believe the delay in these proceedings has been excessive and that, in many of the extension requests, Rule 32 counsel failed to show “extraordinary circumstances” as contemplated in Rule 32.4(c)(2).

that will allow any court in the future to understand the resolution[.]” then “[n]o useful purpose would be served by this court rehashing the trial court’s correct ruling in a written decision.” *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Here, in a detailed ten-page ruling, the trial court clearly and correctly addressed the merits of most of the issues Wildman raised in his petition for post-conviction relief that he also raises in his petition for review.² We will not repeat that analysis here. We do, however, address those claims the trial court did not expressly discuss in its ruling and we also clarify the resolution of other particular claims.

¶5 Wildman first argues the trial court abused its discretion in finding trial counsel was not ineffective for failing to call three witnesses. In the subsequent argument, he appears to add an additional witness. Although he complains that the trial court failed to address his argument concerning this witness, in the petition below he similarly claimed error pertaining to three witnesses and then added a fourth. The trial court granted an evidentiary hearing on the claim with respect to the first three witnesses—Jessica D., Marcus S., and Ricky C. In its final ruling, the trial court correctly addressed and denied relief on the claim with respect to these witnesses. We adopt that portion of its ruling.³ *See id.*

²The trial court noted, at the beginning of its ruling, that any claim not directly addressed had been “considered and summarily denied.”

³In resolving the claim regarding the failure to call the first three witnesses, the trial court listed the various transcripts it had considered in rendering its decision. One of the transcripts it listed was Jessica D.’s testimony at Cathy Fuller’s trial. That transcript is not in the record before us and it apparently was never admitted as an exhibit at the evidentiary hearing. Wildman was responsible for ensuring the transcript was included in the record. *See State v. Wilson*, 179 Ariz. 17, n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). We presume the contents of the missing transcript would support the trial court’s decision, *see id.*, and we

¶6 Wildman did not include the fourth witness, Cody H., in the heading of this claim, and the trial court did not directly address the claim that counsel had been ineffective in failing to call him as a witness. The decision regarding which witnesses to call is strategic and “will not normally support a claim of ineffective assistance of counsel.” *State v. Gerlaugh*, 144 Ariz. 449, 462, 698 P.2d 694, 707 (1985); *see also State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985) (attorneys have wide latitude to make tactical decisions; scrutiny will be deferential). According to Wildman, Cody testified at Cathy Fuller’s trial, for the same murder. Cody apparently testified that he knew Fuller and had seen her with the victim on the night of the murder. Wildman argued this evidence was critical to support his third-party culpability theory, namely that Fuller had committed the murder. We first note that a transcript of Cody’s testimony is not in the record before us. It was Wildman’s responsibility to ensure “the record contains the material to which he takes exception.” *See State v. Wilson*, 179 Ariz. 17, n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). We presume the missing transcript would support the trial court’s decision. *See id.*

¶7 Even accepting Wildman’s factual allegations on this issue as true, the trial court could have found Cody’s testimony at most would have implicated Fuller in the murder but that it would not have exculpated Wildman. The trial court also could have found that Cody’s testimony would not have raised a reasonable probability that the outcome of the case would have been different. *See Nash*, 143 Ariz. at 398, 694 P.2d at 228 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors,

otherwise agree with the trial court’s resolution of this claim in light of the record that is before us.

the result of the proceeding would have been different.”), *quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984). The trial court did not abuse its discretion in summarily denying relief on this claim.

¶8 Wildman next argues the trial court erred by finding that the state’s presentation of mutually exclusive inconsistent theories did not violate his due process rights and that trial counsel was not ineffective concerning this issue. The trial court found the prosecutor’s explanations for the differing strategies satisfactory and Wildman has given us no reason to disagree. Moreover, this case lacks the egregious circumstances found in *Thompson v. Calderon*, 120 F.3d 1045, 1057-59 (9th Cir. 1997), *rev’d on other grounds by Calderon v. Thompson*, 523 U.S. 538 (1998), on which Wildman relies. We adopt the trial court’s ruling concerning this issue. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360.

¶9 Wildman also contends the trial court erred by denying relief on his claim that the prosecutor committed misconduct by asserting that a detective who had testified at Wildman’s first trial was unavailable to testify at his second trial. Wildman’s counsel stipulated that the detective’s testimony from the first trial could be read aloud during the second trial rather than have the trial continued. In denying relief on this claim, the trial court characterized it as a claim that his counsel had been ineffective for not challenging the state’s assertion that the detective was unavailable and for stipulating to the admission of the prior testimony. Although Wildman had blended claims of ineffective assistance of counsel and prosecutorial misconduct in his Rule 32 petition, in his reply to the state’s response Wildman explained he was not alleging ineffective assistance of counsel with respect to the detective’s unavailability. Rather, he was only claiming prosecutorial misconduct. Because

Wildman could have raised a prosecutorial misconduct claim both at trial and on direct appeal, the claim was waived and is precluded. *See* Ariz. R. Crim. P. 32.2(a), (b). Therefore, the trial court did not abuse its discretion in denying relief on this claim. *See State v. Flores*, 218 Ariz. 407, n.14, 188 P.3d 706, 715 n.14 (App. 2008) (we affirm trial court’s ruling if correct for any reason).

¶10 In a related claim, Wildman asserted in his Rule 32 petition that the state had committed misconduct because the detective had manipulated evidence. His argument on review, however, is insufficient and the claim is waived. *See State v. Ekmanis*, 180 Ariz. 429, 432, 885 P.2d 117, 120 (App. 1994). Moreover, in both his petition below and to this court, Wildman again blended this claim with his claim of ineffective assistance of counsel; and again, the trial court addressed the claim as a claim of ineffective assistance of counsel. But Wildman has not articulated any argument that counsel was ineffective with respect to this purported misconduct in either the petition below or on review. Rather, like the issue of the detective’s unavailability, Wildman has only argued the issue as state misconduct. Therefore, this claim is also precluded, *see* Rule 32.2(a), (b), Ariz. R. Crim. P., and Wildman does not argue otherwise.

¶11 Wildman also claimed below that trial counsel had been ineffective in failing to make the proper arguments when seeking to preclude the testimony of Susan O. and Maria W. Wildman asserted counsel had sought to preclude both witnesses’ testimony on the grounds of relevance and prejudice, but that counsel should have argued the testimony was barred by Rule 404(b), Ariz. R. Evid. The trial court addressed Wildman’s argument with respect to Susan O.’s testimony and concluded that, although trial counsel was “ultimately

unsuccessful” in precluding the testimony, counsel had “made the correct arguments and cited the appropriate legal authority.” In the petition Wildman filed below, he failed to include his claim regarding Maria W. in the heading to his argument and the trial court did not expressly address the issue in its ruling.

¶12 Wildman claims the trial court abused its discretion in denying these claims. Although Wildman cited portions of the trial record in both the petition filed below and in his petition for review, the materials cited do not appear to be a part of the record in this post-conviction proceeding. Again, Wildman was responsible for ensuring the record contained “the material[] to which he takes exception.” *See Wilson*, 179 Ariz. 17, n.1, 875 P.2d at 1324 n.1. In the absence of the relevant portions of the trial record, we presume the missing material would support the trial court’s conclusion that counsel had made the correct arguments and offered proper legal authority with respect to Susan O.’s and Maria W.’s testimony. *See id.* The trial court did not abuse its discretion in summarily denying relief on these claims.

¶13 Wildman also claimed in the petition he filed below that trial counsel had been ineffective for failing to elicit certain testimony from a witness who did testify, Susan B. The trial court did not directly address this issue. Wildman claims the witness stated that Wildman had asked if the witness’s boyfriend had heard from the victim on the day of the murder, asserting that could show Wildman did not know the victim was dead. But the witness’s vague statement could easily be read differently. Wildman also asserts counsel should have elicited testimony that a car owned by the victim did not have an engine in it. He maintains this would have established the car that Wildman and a co-defendant had been

trying to acquire after the murder, was “not worth much.” But Wildman does not explain, nor is it apparent, how this evidence would have been relevant to the determination of Wildman’s guilt.

¶14 As to a related issue regarding counsel’s purported failure to impeach Susan B. and another witness, the court concluded that such decisions are tactical and within counsel’s discretion. *See Nash*, 143 Ariz. at 398, 694 P.2d at 228 (attorneys have wide latitude to make tactical decisions; scrutiny deferential); *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984) (“Disagreements as to trial strategy . . . will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis.”). The trial court did not abuse its discretion when it correctly found the inconsistent statements counsel might have used for impeachment “were not of such nature as to call counsel’s performance into question.” The same analysis applies to counsel’s decisions about what testimony to elicit from witnesses. And, we likewise agree with the trial court’s implicit conclusion that the alleged omissions from counsel’s examination of Susan B. did not amount to deficient performance. *Cf. State v. Moreno*, 153 Ariz. 67, 69-70, 734 P.2d 609, 611-12 (App. 1986) (rejecting ineffective assistance of counsel claim based on complaints involving “minutiae of the defense presentation”). Additionally, the trial court reasonably could have concluded that the witness’s vague statement would not have changed the result of the trial and that the information about the car would have been irrelevant. *See Nash*, 143 Ariz. at 398, 694 P.2d at 228 (prejudice from ineffective assistance requires showing reasonable probability of different outcome).

¶15 For the foregoing reasons, the trial court did not abuse its discretion in denying Wildman’s petition for post-conviction relief. Therefore, although we grant review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge